(1) 90-1771

Supreme Court, U.S.
FILED
MAY 9 1991
OFFICE OF THE CLERK

No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA,

RESPONDENT

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

REAL PARTIES IN INTEREST

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether zoning and licensing ordinances involving important state interests and municipal home rule powers ("municipal affairs"), and procedures which utilize quasi-judicial review by municipal officials (such as the licensing of a business and zoning of real property within a municipality) implicate the acts of a sovereign state which, under the Eleventh Amendment, may not be interfered with by a federal court, absent an allegation of the "extraordinary circumstances" which was mandated by Huffman v. Pursue Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), reh. den. 421 U.S. 971, 44 L.Ed.2d 463, 95 S.Ct. 1969 in 1975?

II.

Whether the United States District Federal Court, pursuant to Huffman v. Pursue Ltd., supra, and its progeny of

cases, should have granted the City of Henderson, Nevada's Motion To Dismiss the federal civil rights action below for (a) lack of subject matter jurisdiction, and (b) failure to state a claim upon which relief can be based?

II

(A) Whether Fantasy Video Plus' claim of federal jurisdiction based upon a civil rights violation is valid where the pleadings show that the alleged civil rights violation is predicated upon the conduct of municipal officials of the City of Henderson, Nevada acting in a quasi-judicial capacity in the exercise of home rule powers over municipal affairs (i.e.; the revocation of a business license based upon the fraudulent misrepresentations in a business license application) and no "extraordinary circumstances" are pleaded; and a civil action is pending in the state court in which those same

claims are at issue and can be heard.

III.

Whether Fantasy Video Plus' claim, that jurisdiction under the Eleventh Amendment ceases to be exclusive when a claim is made that the conduct which is engaged in involves "expressive speech" under the First Amendment to the Federal Constitution, is valid as applied to the quasi-judicial acts of the municipal officials of the City of Henderson in their exercise of home rule powers over municipal affairs, and where no "extraordinary circumstances" are pleaded?

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NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

REAL PARTIES IN INTEREST

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners City of Henderson, a Nevada municipal corporation, et al., respectfully pray that a writ of certiorari be issued pursuant to Rule 13 of the Rules of the Supreme Court of the

United States to review: (1) the order of the United States District Court, which denied the City's motion to dismiss the civil rights action filed in federal court by the Real Parties in Interest ("Fantasy Video Plus" et al.), and (2) the May 2, 1991 order of the United States Court of Appeals for the Ninth Circuit which denied the City's petition for writ of mandamus and application for a stay of proceedings in the U.S. District Court. The City's motion to dismiss contended that a dismissal was mandated because of the federal court's lack of subject matter jurisdiction and failure to state a claim upon which relief can be based.

While the petition for writ of mandamus was pending in the Court of Appeals, Petitioner also prepared a petition for writ of certiorari pursuant to Rule 11 of the United States Supreme Court Rules, claiming that the

jurisdictional aspect of the case was of such imperative public importance as to justify deviation from normal appellate practices, and require immediate settlement in this Court (see copy of petition for writ of certiorari pursuant to Rule 11 on file in this Court at pages 3-12) because:

(1) The same jurisdictional question [regarding the Eleventh Amendment scope of protection against unwarranted federal intrusion with important state interests] is pending in this Court in Michael Barnes, Prosecuting Attorney of St. Joseph County, Indiana, et al., Petitioners, v. Glen Theatres, Inc. et al., No. 90-26, which was argued on January 7, 1991 and is awaiting decision. See the action taken by this Court on January 7, 1991, granting the Motion of James J. Clancy for leave to file a brief as amicus curiae in the Barnes case, supra, in 111 S.Ct. at 642, with respect to the

argument therein made that it is the duty of this Court to rule on the jurisdictional question and dismiss the action for lack of subject matter jurisdiction even though the parties themselves have not raised the issue. City of Kenosha v. Bruno, 412 U.S. 507 at 511, 37 L.Ed.2d 109, at 115-116, 93 S.Ct. 2222 (June 11, 1973); Bender v. Williamsport Area School Dist. et al., 475 U.S. 534 at 541-542 and 546-549, 89 L.Ed.2d 501 at 511-512 and 514-516, 106 S.Ct. 1326 (March 25, 1986); F.W./P.B.S. Inc. v. Dallas, 493 U.S. ___, 107 L.Ed.2d 603, at 621-622, 110 S.Ct. ___ (January 9, 1990). See Supreme Court Practice, Sixth Edition, Stern, Gressman, and Shapiro, at Section 4.16 on page 221 and at Section 4.20 on page 228;

(2) Federal courts are not courts of general jurisdiction, but have only the power that is authorized by Article

III of the United States Constitution, and the statutes enacted by Congress pursuant thereto. Bender v. Williamsport Area School Dist. et al., supra. The dockets of the Courts of Appeal have been and are being clogged with the wrongful filings of civil rights actions of this nature which (in addition to exceeding constitutional limitations) as a simple matter of judicial efficiency belong in the state court systems. Although this Court in 1975 decided Huffman v. Pursue, Ltd., supra, on the jurisdictional issue inherent in the Eleventh Amendment, fifteen years later that fact (as did occur in the Indiana Barnes case, supra) is overlooked by state law enforcement, being obscured by the brief reference to "jurisdiction" in the last paragraph of the majority Huffman issue, and the present refusal of the federal District Court and Court of Appeals to address

and resolve this jurisdictional issue. See Huffman v. Pursue, Ltd., petition for rehearing denied in 421 U.S. 971, 44 L.Ed.2d 463, 95 S.Ct. 1969, and compare the differing opinions of Justice Tang and Kennedy in World Famous Drinking Emporium discussed hereinafter at page 39 et seq. In contrast, the jurisdictional issue in Petitioner City of Henderson, Nevada's case herein is drawn in a clear cut manner, having been predicated on the United States District Court's interference with the basic Home Rule Power of the City of Henderson to revoke the granting of a license to a business in the City of Henderson on the ground of fraudulent misrepresentation. Petitioner City of Henderson contends that this Court should grant the Henderson petition for writ of certiorari, on the jurisdictional issue herein and reverse the District Court's order, and also remand the Indiana

Barnes case (which is presently awaiting a decision) as improvidently granted, and remand that case for reconsideration in the light of this Court's decision on the Eleventh Amendment jurisdiction issue herein. Petitioner City of Henderson contends that the many years of federal litigation spent in the Barnes case, supra, in Indiana would have been avoided had the City of South Bend, Indiana and the Attorney General of the State of Indiana realized that under the Eleventh Amendment, an option was available to require that such matters be addressed in the state court system under Huffman v. Pursue, Ltd.

(3) In addition to exceeding the scope of jurisdiction granted to federal courts under Article III of the United States Constitution, the disruptive interference by federal courts, as exemplified by the Huffman case in Ohio and Barnes (supra) case in Indiana, is

harmful to important state interests and Home Rule Powers. Because of disruptive federal interference, state courts have been prevented from ruling on important state legal issues. For example, in the Ohio case of Huffman v. Pursue, Ltd., supra, the appellate question as to the power of state courts to close a 100% continuing public nuisance (obscenity) was never decided in the Ohio appellate state system because of federal court interference with state proceedings. Because a final state determination on this important legal issue regarding the scope of available state remedies was improperly blocked by the federal courts, an Ohio appellate determination on "closure" was unavailable as a precedent for other state court systems, leaving the "closure" issue unsettled across the Nation. See Jurisdictional Question #1 posed in the Petition for writ of certiorari in Cooper v. Mitchell

Brothers Santa Ana Theater et al., No. 81-271, October Term 1980, decided on other grounds in 454 U.S. 90, 70 L.Ed.2d 262, 102 S.Ct. ___ (Nov. 30, 198___) and Jurisdictional question #1 posed in Cooper v. Mitchell Bros. Santa Ana Theater et al., No. 82-345, October Term 1982, denied in 459 U.S. 944, 74 L. Ed. 2d 202, 103 S.Ct. 259 (October 18, 1982).[1/]

(4) For the same reason, unless this Court assumes jurisdiction of this case, the jurisdictional question herein (regarding the proper scope of the Eleventh Amendment) will never be properly settled, in as much as the United States District Court intends to

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1/ Because the "closure" question has never been answered as to the public nuisance abatement process, the City of Santa Ana "threw in the towel" in 1987, after spending more than $400,000 on the abatement procedure, paid the Mitchell Brothers their attorneys fees, and allowed them to continue to operate in Santa Ana.

assume jurisdiction (see the order of United States District Judge George dated April 9, 1991, at Appendix 6 to this Petition) and, (a) will require the City of Henderson to go to trial in the Federal District Court of Nevada, and (b) address extraneous collateral issues and incur litigation costs it should never have to address and (c) decide the case on collateral issues which are not ripe (i.e. are premature and irrelevant). Under the 11th Amendment, Petitioners have a right not to stand trial on the federal allegations, since Fantasy Video Plus has failed to allege facts supporting Article III jurisdiction. The federal trial is barred under the principles of Huffman, supra. Facts supporting Article III jurisdiction must appear affirmatively from the record. A right not to stand trial cannot be effectively vindicated after the trial has occurred. Abney v.

U.S., 431 U.S. 651.

(5) Because of federal interference the City of Henderson is suffering irreparable harm.[2/]

On Thursday May 9, 1991, Petitioner's attorney personally delivered to U.S. Supreme Court Clerk Lorson, 40 copies of a petition for writ

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2/ Having been enjoined from carrying out its responsibilities under its charter powers (see preliminary injunction at Appendix 4), the City maintained periodic surveillances of the business operation activity. On Monday, November 5, 1990, the surveillance investigator learned that on the previous morning a 22 year old night clerk was found shot to death inside a viewing booth. See, also, Henderson Home News, dated November 6, 1990. On March 11, 1991, the City of Henderson purchased the following 8 video tapes:"Autobiography of a Flea;" "Sodom and Gomorrah;" "Inside Marilyn Chambers;" "Resurrection of Eve;" "Deep Throat;" "Devil in Miss Jones;" "French Classmates;" and "Formal Fawcett;" all of which have been adjudicated to be obscene under the Memoirs standard [see A Book v. Attorney General, 383 U.S. 413 (1966)] and final judgments entered as to each in public nuisance abatement litigation in Santa Ana, California.

of certiorari to the Ninth Circuit pursuant to Rule 11 (before judgment). Mr. Lorson was also informed that at 3:37 p.m. on the previous day (May 8th) Counsel of Record in Sun Valley, California, had been informed by a fax transmission from the Henderson City Attorney's office that it received in that day's mail a copy of a May 2, 1991 Ninth Circuit Order which denied the City's petition for writ of mandamus and request for a stay. A copy of that order is set forth at Appendix 7 to this petition. Counsel of Record was advised by Mr. Lorson that, inasmuch as an order was now of record, Rule 11 was no longer applicable and the petition should be resubmitted under Rule 13. Accordingly Petitioners are resubmitting the same petition under Rule 13. Mr. Lorson retained one copy of the Rule 11 submission for this Court's files.

OPINIONS BELOW

A copy of the Henderson City Council Decision dated April 16, 1990 is set forth at Appendix 2 to this Petition. A copy of the City's complaint and answer thereto, is set forth at Appendix 1.

A copy of the District Court's April 27, 1990 temporary restraining order and June 4, 1990 preliminary injunction is set forth at Appendix 3 and 4 to this Petition.

A copy of the March 22, 1991 District Court Opinion which: (1) denied the Petitioner' motion to dismiss the civil rights lawsuit, and (2) refused to issue an order to show cause is set forth at Appendix 5 to this Petition.

A copy of the April 9, 1991 District Court Order which denied Petitioners' motion to certify an interlocutory appeal is set forth at Appendix 6 to this Petition.

A copy of the Court of Appeals order dated May 2, 1991 which denied the City's petition for writ of mandamus and application for stay is set forth at Appendix 7 to this Petition.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and Rule 13 of this Court.

CITY ORDINANCES INVOLVED

The text of Henderson Municipal Code sections 4.05.150(a)(1), (3), and (4); 4.04.150(b)(2), (3), and (5); and 4.06 (entire section) is set forth at Exhibit 4 to Petition for Writ of Mandamus and Application For Stay of Proceedings on file in the Court of Appeals for the Ninth Circuit, a true copy of which is being filed with this Court concurrently with this Petition.

STATEMENT OF THE CASE

Petitioners City of Henderson, Nevada, et al. seek an order of this

Court requiring the Honorable Lloyd George, United States District Judge, to vacate and annul its order entered March 22, 1991, and to grant Petitioners' Motion to Dismiss the federal civil rights complaint now pending before him, for lack of federal jurisdiction of the subject matter and for failure to state a claim upon which relief can be granted, pursuant to Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), as further explicated in Pennhurst State School & Hospital et al. v. Halderman et al., 465 U.S. 89 (1984), and Pennzoil Company v. Texaco, Inc., 481 U.S. 1 (1987). See, also, World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079, at 1084 (CA 9, 1987), concurring opinion of Associate Justice Anthony Kennedy, and compare Partington v. Gedan, 880 F.2d 116 (CA 9, 1989), at 120.

A copy of the United States District Court, District of Nevada Order and Opinion entered March 22, 1991 is attached hereto as Appendix 5 to this Petition. A true copy of the Petitioners' Petition for Writ of Mandamus and Application for Stay of Proceedings on file in the Court of Appeals for the Ninth Circuit is being filed with the Clerk of the Court concurrently with this Petition for Writ of Certiorari herein. A copy of the Real Parties in Interest federal civil rights complaint on file below in the United States District Court appears at Exhibit 2(A) to the Petition for a Writ of Mandamus and Application for Stay of Proceedings on file in the Court of Appeals for the Ninth Circuit, a true copy of which is being filed with this Court. A copy of Petitioners' Motion to Dismiss and Application for Order to Show Cause is attached as Exhibit 3(A)

and 3(F) to the Petition for Writ of Mandamus and Application for Stay of Proceedings on file in the Court of Appeals for the Ninth Circuit, a true copy of which is being filed with the Clerk of this Court.

The facts necessary to an understanding of the controlling question of law determined by the district court's order are as follows:

I
STATEMENT OF FACTS

The City of Henderson, Nevada, adopted a new, comprehensive Municipal Zoning Code and Municipal License Code in 1989, following lengthy public hearings and proceedings on such Codes. Under the Zoning Code, as amended, a new provision was added for an "adult business" which was authorized only in the "CH" Zone," which also required an application for a business license, and

a conditional use permit for that type of business activity.

During the period of transition from the old to the new Codes, the Real Parties in Interest Nevada Entertainment Industries, Inc. et al. applied to the City for a business license to operate a sexually oriented adult business under the name "Fantasy Video Plus." Nevada Entertainment Industries, Inc. did admit for purpose of its litigation, that it is an "Adult Business." In the process of applying for the business license, Real Parties in Interest learned of the new provisions for sexually oriented adult businesses, including the requirement for a conditional use permit, but did not apply for a conditional use permit. Instead, in their application for a business license, Real Parties in Interest, with knowledge of the substantive difference between the two categories, described

the business activity of "Fantasy Video Plus" as "mass media books and video store, novelty shop, etc.," rather than using the correct category of "adult business." Because of this knowing misrepresentation, Real Parties in Interest were issued a business license for "Fantasy Video Plus."

Upon further processing that application, the City's License Department learned that "Fantasy Video Plus" was operating an "adult business" without having applied for a conditional use permit, and ordered the business to cease such operations.

Upon their failure to comply, a license revocation proceeding was brought before the City Council [see Exhibit 5 to the Petition for Writ of Mandamus and Application for Stay of Proceedings on file in the Court of Appeals for the Ninth Circuit, a true copy of which has been filed with the

Clerk of the Court], under procedures set forth in the Henderson Municipal Code (hereinafter "H.M.C."), to revoke the license on the grounds of fraud. See H.M.C. Sections 4.04.150(a)(1), (3)(4); and 4.04.150(b)(2), (3)(5) (at Exhibit 4 to the Petition for Writ of Mandamus and Application for Stay of Proceedings on file in the Court of Appeals for the Ninth Circuit, a true copy of which has been filed with the Clerk of the Court. Following a public hearing, in quasi-judicial administrative proceedings on that issue, the City Council revoked the license upon a finding of "fraud," but stayed the effect of its order to allow the Real Parties in Interest to appeal its finding and decision to the Nevada Eighth Judicial District Court, as is authorized by H.M.C. Section 4.06.160, see Exhibit 4 to the Petition for Writ of Mandamus and Application for Stay on

file in the Court of Appeals for the Ninth Circuit, a true copy of which has been filed with this Court.

In the above quasi-judicial administrative proceedings, Real Parties in Interest were afforded a state evidentiary hearing prior to revocation of license. There was a pre-revocation state administrative hearing (see copy of proceedings before the Henderson City Council on April 10, 1990 appearing in Exhibit 5 (F) to the Petition for Writ of Mandamus and Application for Stay on file in the Court of Appeals for the Ninth Circuit, a true copy of which has been filed with this Court); as well as opportunity for a prompt post-deprivation state court hearing which assured a prompt proceeding and expeditious disposition of all issues (including constitutional claims) involved in the revocation. After the license was revoked, the City Council's

10 business days stay of enforcement order was issued in order to allow immediate review by the state court. See City Council Decision and Order dated April 16, 1990, a copy of which is attached hereto as Appendix 1 to this Petition. See, also, H.M.C. Section 4.06.160, appearing at Exhibit 4 to the Petition for Writ of Mandamus and Application for Stay on file in the Court of Appeals for the Ninth Circuit, a true copy of which has been filed with this Court.

Instead of seeking review of the City Council's findings and decision in State Court, Real Parties in Interest filed an original action under 42 U.S.C. section 1983 in the U.S. District Court within the stay period granted by the City Council, while the action was still pending within the state system (see Exhibit 2(A) to the Petition for Writ of Mandamus and Application for Stay on file in the Court of Appeals for the

Ninth Circuit, a true copy of which has been filed with this Court.) On April 27, 1990, the U.S. District Court issued a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. On June 4, 1990, following oral argument on the law relative to the pleadings, in which no extrinsic evidence was adduced, the U.S. District Court issued a preliminary injunction, enjoining the City from further action both on the license revocation and the matter in general. (See copy of temporary restraining order at Appendix 3 to this Petition and copy of preliminary injunction at Appendix 4 to this Petition.)

On October 1, 1990, after further study of the United States Supreme Court's opinion in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the City declared its refusal to consent to federal jurisdiction, and (1) on January

3, 1991, filed a declaratory judgment lawsuit in the Nevada District Court (see copy of declaratory judgment complaint appearing as Exhibit 3(B) to the Petition for Writ of Mandamus and Application for Stay on file in the Court of Appeals for the Ninth Circuit, a true copy of which has been filed with this Court); and a motion to dismiss the Civil Rights lawsuit in the United States District Court on the grounds of lack of federal jurisdiction (11th amendment) and failure to state a claim upon which relief can be based, and (2) requested the United States District Court to issue an order to show cause why Plaintiffs should not be required to present their federal claims in th State lawsuit. See copy of Motion to Dismiss and Application for a Show Cause Order at Exhibit 3(A) and 3(F) to the Petition for Writ of Mandamus and Application for Stay on file in the

Court of Appeals for the Ninth Circuit, a true copy of which has been filed with this Court.

The City requested that such motions be set for an immediate hearing on the grounds that the Huffman doctrine applied to this case, that the District Court had no discretion in the matter and must dismiss the complaint, and that the United States Supreme Court had made it clear that its opinion in Huffman was predicated upon lack of federal jurisdiction, relying upon the last paragraph of the Huffman opinion reading:

> "We therefore think that this case is appropriate for remand so that the district court may consider whether...the district court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this

kind." 420 U.S. 592, at 612.

The City further claimed that such analysis is supported by the Ninth Circuit Court of Appeals concurring opinion of Associate Justice Anthony Kennedy, then sitting on the Court of Appeals for the Ninth Circuit in World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1084 (CA 9, June 26, 1987), which holds:

> KENNEDY, Circuit Judge, concurring:
>
> "General principles of abstention are distinct from the doctrine of dismissal for lack of jurisdiction pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200 (1975). Only the latter rule is applicable here, and Huffman squarely controls. I concur in the judgment [of dismissal]."

Justice Kennedy was of the opinion that,

contrary to the majority opinion expressed by Justice Tang, the United States District Court lacked subject matter jurisdiction and had no discretion in this matter. See, also, the analysis of U.S. Magistrate James Groh in Alleghany Corp. v. Haase, 708 F.Supp. 1507 (W.D.Wis. 1989), at 1526-1527, which refers to the Ninth Circuit's City of Tempe, supra, decision, and compare Partington v. Gedan, 880 F.2d 116 (CA 9, 1989) at 120.

On March 22, 1991 (almost six months after the City of Henderson filed its motion to dismiss and request for an immediate hearing) Respondent Court filed its opinion and order which denied the Petitioners' motion to dismiss, on the basis of the Court's interpretations of the same cases and set the case for a pretrial hearing on the following week, Friday, March 29, 1991. See copy of March 22, 1991 Order at Appendix 5 to

this Petition.

On April 1, 1991, the City of Henderson filed a Motion in which it requested the Court to amend its order of March 22, 1991, so as to authorize an immediate interlocutory appeal to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. Section 1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure, and, if necessary, to the United States Supreme Court, to decide the jurisdictional claim that the United States District Court lacks federal jurisdiction (subject matter jurisdiction) to interfere with Nevada's important state interests and home rule authority to adjudicate issues regarding the State of Nevada and the City of Henderson's licensing procedures and the correctness of the quasi-judicial fact finding of the City Council that the license of Fantasy Video Plus should be revoked because of the use of fraud in

obtaining the business license. See copy of Motion to Amend Interlocutory Order and Stay Proceedings appearing at Exhibit 7 to the Petition for Writ of Mandamus and Application for Stay on file in the Court of Appeals for the Ninth Circuit, a true copy of which has been filed with this Court. On March 29, 1991, United States District Court Judge Lloyd George, without ruling on the City's motion, indicated at a pre-trial conference that he wished to proceed quickly and hold the trial within three to four weeks, and that such issues should be decided in an appeal from the merits, rather than an interlocutory appeal (see Reporter's Transcript for March 29, 1991, appearing in Exhibit 8 to the Petition for Writ of Mandamus and Application for Stay on file in the Court of Appeals for the Ninth Circuit, a true copy of which has been filed with this Court.) On April

9, 1991, Judge George entered an Order denying the City's Motion to Amend his order to permit an interlocutory appeal; see copy set forth at Appendix 6 to this Petition.

II
STATEMENT OF ISSUES

The issue herein raised is whether Justice Tang's majority opinion in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (9th Cir. 1987) or Justice Anthony Kennedy's concurring opinion (based upon the Court's lack of subject matter jurisdiction) is a correct statement of the law. The Ninth Circuit Court of Appeals has not ruled definitively on this issue, and has a duty to do so. Louisville & Nashville R.Co. v. Mottley, 211 U.S. 149, 152, 53 L.Ed.2d 126, 29 S.Ct. 42 (1908), cited in City of Kenosha v. Bruno, 412 U.S. 507, at 511, 37 L.Ed.2d 109, at 115, 93 S.Ct. 2222 (1973), Bender v.

Williamsport Area School District, 475 U.S. 534, at 541, 546-548, 89 L.Ed.2d 501, at 511, 514-516, 106 S.Ct. 1326 (1986) [emphasizing federal courts are not courts of general jurisdiction but have only the power that is authorized by Article III of the United States Constitution and the statutes enacted by Congress pursuant thereto, and for that reason, a federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also of the jurisdiction of the lower courts]. See Sumner v. Mata, 449 U.S. 539, at 547, 66 L.Ed.2d 722, at 731, 101 S.Ct. 764 [habeas corpus statute, holding interest in federalism requires deference by federal courts to factual determinations of all state courts.]; FW/PBS, Inc. v. Dallas, 493 U.S. ___, 107 L.Ed.2d 603, 110 S.Ct. ___ (1990) ["federal courts are under an independent obligation to examine their

own jurisdiction, and standing 'is perhaps the most important of (the jurisdictional) doctrines.'"]

JURISDICTIONAL QUESTION #1:

Whether zoning and licensing ordinances involving important state interests and municipal home rule powers ("municipal affairs") and procedures which utilize quasi-judicial review by municipal officials implicate the acts of a sovereign state which, under the Eleventh Amendment, may not be interfered with by a federal court, absent an allegation of the "extraordinary circumstances" which was mandated by Huffman v. Pursue Ltd., supra.

Petitioners contend the Eleventh Amendment bars the filing of the Civil Rights Complaint in the District Court.

JURISDICTIONAL QUESTION #2:

Whether the District Court should have granted the City's Motion To

Dismiss the civil rights action below for (a) lack of subject matter jurisdiction, and (b) failure to state a claim upon which relief can be based?

Petitioners contend that the federal judges below have neglected their judicial responsibility to correct jurisdictional error.

JURISDICTIONAL QUESTION #3:

Whether Fantasy Video Plus's claim, that jurisdiction under the Eleventh Amendment ceases to be exclusive when a claim is made that such conduct is also "expressive speech" under the First Amendment to the Federal Constitution, is valid as applied to the quasi-judicial acts of the municipal officials of the Petitioner City of Henderson, in their exercise of home rule powers?

Petitioners contend that the First Amendment claim is patently spurious when viewed in the light of the trial court pleadings, which establish that:

(1) The City objects to federal jurisdiction;

(2) Important state interests and home rule powers are involved, such as:

(a) The orderly administration of land use planning/zoning laws/adult businesses; and

(b) Tax power (through the issuance of business licenses): protection and integrity of revenue raising process; and

(c) Need to protect public health and safety against fraud and public nuisances (unlicensed businesses, unlawful business activity); and

(d) Need to prevent unlawful use of property; and

(e) The efficient administration and interpretation of regulatory Home Rule ordinances;

(3) Fantasy Video Plus was afforded a state pre-revocation evidentiary hearing in administrative

proceedings which were quasi-judicial in nature (in which Fantasy Video Plus was found by municipal officials exercising quasi-judicial powers to be guilty of making fraudulant statements in its application for a business license by the trier of fact);

(4) Under the city ordinance, Fantasy Video Plus was afforded an opportunity for a post-deprivation state court hearing which assured a prompt proceeding and expeditious disposition of all issues (including constitutional issues) involved in the revocation;

(5) Fantasy Video Plus has not pleaded the extraordinary circumstances exception which Huffman, supra, in 1975 required, nor has it shown that the above state review procedures are inadequate;

(6) The state quasi-judicial administrative action was en train and the state body had acted before the

federal action was filed, having: (a) determined that the license should be and was revoked; (b) ordered that written notice of its decision be given to the licensees within five business days; and (c) stayed the enforcement of the revocation for ten business days following receipt of the written notice of revocation, with the expectation that Fantasy Video Plus would pursue review via the state court system; and

(7) Fantasy Video Plus is challenging the City of Henderson municipal zoning law which requires the issuance of a conditional use permit, in circumstances where (a) Fantasy Video Plus has never applied for such a permit; (b) the "conditional use" ordinance has never been construed by a state court; and (c) as a matter of law, said ordinance is susceptable of at least one constitutional interpretation by both the City administrative and the

Nevada judicial system through judicial construction of said ordinance.

REASONS FOR GRANTING THE WRIT

I

THE FEDERAL COURTS HAVE A DUTY TO CORRECT JURISDICTIONAL ERROR AT ALL STAGES OF THE PROCEEDINGS.

Louisville & Nashville R.Co. v. Mottley, 211 U.S. 149, 152, 53 L.Ed.2d 126, 29 S.Ct. 42 (1908), cited in City of Kenosha v. Bruno, 412 U.S. 507, at 511, 37 L.Ed.2d 109, at 115, 93 S.Ct. 2222 (1973), Bender v. Williamsport Area School District, 475 U.S. 534, at 541, 546-548, 89 L.Ed.2d 501, at 511, 514-516, 106 S.Ct. 1326 (1986) [emphasizing federal courts are not courts of general jurisdiction but have only the power that is authorized by Article III of the United States Constitution and the statutes enacted by Congress pursuant thereto, and for that reason, a federal appellate court has a special obligation to satisfy itself not

only of its own jurisdiction, but also of the jurisdiction of the lower courts]. See Sumner v. Mata, 449 U.S. 539, at 547, 66 L.Ed.2d 722, at 731, 101 S.Ct. 764 [habeas corpus statute, holding interest in federalism requires deference by federal courts to factual determinations of all state courts.]; FW/PBS, Inc. v. Dallas, 493 U.S. ___, 107 L.Ed.2d 603, 110 S.Ct. ___ (1990) ["federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of (the jurisdictional) doctrines.'"]

II

RELIEF SOUGHT: A DETERMINATION THAT: (1) HUFFMAN v. PURSUE, LTD. IS APPOSITE; (2) THE UNITED STATES DISTRICT COURT HAS NO "DISCRETION TO ABSTAIN;" AND (3) IT "LACKS (SUBJECT MATTER) JURISDICTION" AND MUST DISMISS THE CIVIL RIGHTS COMPLAINT.

The United States Supreme Court's opinion in Huffman, supra, is not

entirely clear as to what that Court meant by the term "jurisdiction" in its remand order in 420 U.S. 592 at 612 that the trial court was to consider whether it "may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind." The City is of the opinion that this Court, in its subsequent decisions in Judice v. Vail, infra; Trainor v. Hernandez, infra; Moore v. Sims, infra; Middlesex County Ethics Committee v. Garden State Bar Ass'n, infra; Ohio Civil Rights Commission v. Dayton Christian Schools, infra; and Penzoil Co. v. Texaco, Inc., supra; has clarified Huffman, so as to require in a case such as this, a dismissal based upon lack of federal jurisdiction. Associate Justice Anthony Kennedy's concurring opinion in World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1084 (CA9,

June 26, 1987) appears to support the petitioners' claim. Compare, Partington v. Gedan, 880 F.2d 116 (9th Cir. 1989) at 120 ["We have held that where Younger abstention is applicable, 'a district court must dismiss the action.' World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079, 1081 (9th Cir. 1987) (World Famous Drinking Emporium), quoting Fresh International Corp. v. Agricultural Labor Relations Board, 805 F.2d 1353, 1356 (9th Cir. 1986)."] However, U.S. District Judge Lloyd George does not agree with the City's analogies of those cases and will not stay the trial of the federal action, and is about to require that the case be tried in the federal district court.

Petitioners contend that in a 42 U.S.C. Section 1983 civil rights action such as this, involving the Eleventh Amendment where federal jurisdiction is dependent upon the "fiction" created in

Ex Parte Young, 209 U.S. 123 (1908), the jurisdiction of the federal court is exhausted, once the fiction of Ex Parte Young is dispelled, and under the Eleventh Amendment the federal court is required to dismiss the lawsuit.

The City claims that this Court's decisions in the following cases, decided subsequent to Huffman v. Pursue, Ltd., supra, made it clear that where a state court was available to render relief on important state interests and "home rule" matters (municipal affairs),[3/] the federal court must dismiss the lawsuit for lack of federal (subject matter) jurisdiction:

(1) Judice v. Vail, 430 U.S. 327 (1977) [challenge to state procedures, not substantive law.

3/ See, generally, as to "municipal affairs," McQuillin, Municipal Corporations, 3rd Edition, Vol. 2 at sections 4.78, "State Affairs" and "Municipal Affairs" through 4.112a, "Zoning" as a "Municipal Affair."

Held: applied Younger v. Harris, 401 U.S. 37 (1971) on basis of respect for a state's right to control areas of important state interest (state contempt process). Examined adequacy of state forum for raising constitutional questions arising out of state judicial proceedings, and held all that is required is an opportunity to fairly pursue constitutional claims in the ongoing state proceedings.];

(2) Trainor v. Hernandez, 431 U.S. 434 (1977) [Welfare case. Important state interest at stake and adequacy of state forum for addressing constitution issues was questioned. Younger abstention required so long as adequate state forum exists. Younger and Huffman bar federal action that interferes

with state proceedings in which important state policies such as safeguarding the fiscal integrity of public assistance programs are at stake. On remand, state forum held inadequate. 471 F.S. 516, summarily aff'd 440 U.S. 951 (1979).];

(3) Moore v. Sims, 442 U.S. 415 (1979) [Child Custody/child abuse case. Younger held fully applicable to civil proceedings in which important state interests are involved.];

(4) Middlesex County Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423 (1982). [Set standards for Younger abstention in civil cases. Applied Younger to non-criminal proceedings, judicial in nature (disciplinary

proceedings). Younger required where:

> (a) proceedings instituted in the state constitute ongoing state proceedings which are judicial in nature (this case);
>
> (b) proceedings implicate important state interests;
>
> (c) proceedings allow adequate opportunity for raising constitutional challenges.];

(5) Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986) [Extended Younger to state administrative proceedings which are judicial in nature.];

(6) Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) [No federal court may enjoin any state judicial or quasi-judicial proceeding.

State forum must be considered adequate until proved otherwise.

--Younger abstention helps to avoid unwarranted determination of federal constitutional questions.

--Younger abstention is mandated if the state's interests in the proceedings are so important that the exercise of the federal judicial power would disregard the comity extended between the states and the national government. (Look for vital/important state interest. The question to be asked is: Does exercise of Federal District Court power implicate a vital/important state interest?).

--Burden is on the federal plaintiff to show: state procedural law bars presentation of its claims. Moore v. Sims, 442 U.S. at 432. Younger v. Harris: "The accused should first set up

and rely upon his defense in state court...unless it plainly appears this course would not afford adequate protection."

--District Court: In the past, under Anti-injunction Act (28 USC section 2283), a federal court has been precluded from enjoining state proceedings unless federal plaintiff can bring his suit within one of the specifically authorized exceptions to the Act. Although Section 1983 is an exception [see Mitchum v. Foster, 407 U.S. 225 (1972)], 42 U.S.C. Section 1983, which creates a cause of action for violations of constitutional rights, is solely a procedural statute which does not itself grant any substantive right. Garcia v. Wilson, (CA NM 1984) 731 F.2d 640, affm'd 471 U.S. 261, 85 L.Ed.2d 254, 105 S.Ct. 1938.];

(7) Parratt v. Taylor, 451 U.S. 420 (1981) acts as a bar if there is an adequate state remedy. The federal forum is barred from entertaining an action. The focus of Parratt is not whether there has been an exhaustion of state remedies in order to establish the jurisdictional prerequisite; rather, Parratt deals with the definition of a constitutional deprivation. Parratt dealt with a tortious loss of property as a result of a random and unauthorized act by a state employee, which was not the result of some established state procedure. In this regard, note that in the area of land use planning, several federal court have considered the possibility that denials of zoning permits, especially at the initial stage before administrative appeals, do

not work constitutional deprivations, because until the state process is final (state administrative and appeals process completed), unsuccessful applicants possess at most a "unilateral expectation," which does not constitute a constitutionally protected property interest. These cases recognize that a State's interest in land use planning is considerable. See Albery v. Reddig, 718 F.2d 245 (7th Cir. 1983); Scott v. Greenville County, 716 F.2d 1409, 1419 (4th Cir. 1983); Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 829-834 (1st Cir. 1982), cert denied, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (1982); LaSalle National Bank v. County of Lake, 579 F.S. 8 (ND Ill. 1984); Brown v. Brienen, 722 F.2d 360, 369 (7th Cir. 1983)

(Flaum, J. concurring); Chiplin Enterprises v. City of Lebanon, 712 F.2d 1524, 1527 (1st Cir. 1983); Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 331, n. 4 (5th Cir. 1981). See also Molgaard v. Town of Caledonia, (DC Wisc. 1981) 527 F.S. 1073, aff'd 696 F.2d 58.

There is no legal authority for Real Parties in Interest to claim a fundamental "right to do business" as an "adult business." See Smith v. County of Los Angeles, 211 Cal.App.3d 188, 259 Cal.Rptr. 231 at 238 (June 5, 1989) where, in response to such a claim regarding an "adult" use and conditional use permit, the Court of Appeal, Second District, Division 7 held:

> "....To date, only four appellate decisions have held that a property owner had a 'fundamental vested right' in a land use matter. Each

case involved classic vested rights and estoppel principles. (See, Monterey Sand Co. v. California Coastal Com., (1987) 191 Cal.App.3d 169, 172, 236 Cal.Rptr. 315; Halaco Engineering Co. v. South Central Coast Regional Com., (1986) 42 Cal.3d 52, 74, 76, 227 Cal.Rptr. 667, 720 P.2d 15; Anderson v. City of La Mesa, (1981) 118 Cal.App.3d 657, 660, 173 Cal.Rptr. 572; Stanton v. San Diego Coast Regional Com. (1980) 101 Cal.App. 3d 38, 48-50, 161 Cal.Rptr. 392.) No case has yet held, in the granting or denial of an application for variance or conditional use permit, that the decision affected a 'fundamental vested right.' In fact, the vast majority of cases considering an allegation of fundamental vested rights requiring exercise of independent judgment

have rejected it. A sampling of these cases appears below in footnote 6."

There is national concern over the negative effects of "Adult Businesses." Communities across the United States have confronted the problem of how to contain and restrict the "secondary effects" associated with the presence of so-called sexually-oriented or "adult businesses" (for example, effects such as urban blight, property depreciation, and crimes). In a series of cases, this Court has upheld the right to use zoning ordinances to restrict the location of "adult businesses" [Young v. American Mini Theatres, 427 U.S. 50 (1976), Renton v. Playtime Theatre, Inc., 475 U.S. 41 (1986), and FW/PBS, Inc. v. Dallas, 493 U.S. ___, 107 L.Ed.2d 603, 110 S.Ct.___ (1990)]. This court should not allow the Home Rule Powers of the City of Henderson, a charter city, be

violated and the enforcement of "home rule" public rights by municipalities under zoning laws to become obfuscated by spurious "constitutional" claims as are made by Real Parties in Interest. This Court has held that zoning ordinances seeking to restrict location of "adult uses" are valid, and do not constitute impermissible prior restraints on free speech, and that such laws are adequately supported by municipal interest in planning and regulating the use of property for commercial purposes. Young v. American Mini Theatres, supra. A city's interest in the character of its neighborhoods and the preservation of the quality of urban life and its Home Rule Authority must be accorded high respect. Renton v. Playtime Theatre, Inc., supra.

This action imposes no restraint at all on Fantasy Video Plus' dissemination of particular materials, since it is

free to carry on its business in a lawful fashion at another location. The fact that such locations may be difficult to find is immaterial. Arcara v. Cloud Books, Inc., 478 U.S. 697, 92 L.Ed.2d 568 at 577, fn. 2, 106 S.Ct. 3172 (1986).

There is ample authority to support the legal proposition that a conditional use zoning ordinance similar to that which has been adopted by the City of Henderson can be constitutionally applied. See 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1415 at pages 1426-1429 [CA4 1989, Rehearing and Rehearing en Banc denied October 25, 1989; cert. granted, remand to U.S.Court of Appeals for further consideration in light of F.W./P.B.S., 493 U.S. ___, 107 L.Ed.2d 603 (1990)].

In the instant case, Fantasy Video Plus did not apply for a conditional use permit and thus failed to exhaust its

administrative remedies, as required. See Shelter Creek Development Corporation v. City of Oxnard, 838 F.2d 375 (9th Cir. 1988) [challenge to constitutionality of city zoning ordinance held not ripe for judicial adjudication as parties never applied for variance or special use permit]; see, also, Ill. Commerce Cmm'n v. Thompson, 318 U.S. 675 and First Nat'l Bank v. Bd. of Cnty Cmmn'rs, 264 U.S. 450 (1924)]. Consequently, the constitutionality of the conditional use in the CH zone is not yet in issue.

III

THE CITY OF HENDERSON HAS BEEN, AND IS PRESENTLY, SUFFERING "IRREPARABLE HARM."

The operation of a business without a license is a public nuisance which requires abatement. See World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1083. The

federal injunction is preventing the City from performing its civil function under its Home Rule Powers.

This federal action is barred by Younger-Huffman principles, which are grounded in the 11th Amendment, and are based upon a Constitutionally mandated deference to state courts in recognition of state sovereignty. Younger-Huffman requires that federal courts refrain from interefering with state court review of administrative application of state law, where the state has enforced its laws or has begun to enforce them. See, also, Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) [the Court applied the articulation found in Middlesex County Ethics Committee v. Garden State Bar Ass'n, 456 U.S. 423 (1982) of the Younger to ongoing state administrative proceedings, judicial or otherwise, in which important state interests are

vindicated and in which the federal plaintiff would have a full and fair opportunity to litigate consitutional claims]; and Pennzoil Company v. Texaco, Inc., 481 U.S. 1 (1987) [Texaco (the state defendant) filed an action in federal court which sought to enjoin Pennzoil (the state plaintiff) from taking any action to enforce a multibillion dollar judgment that a Texas state court had rendered against Texaco and in favor of Pennzoil. Texaco did not avail itself of available state remedies, but filed an injunctive action in federal court. The Court found that the existance of an available state forum in which to Texaco could have raised its claims (which forum the Court held would be considered adequate until proved otherwise) barred Texaco's federal action.]

State proceedings (not tainted by bias, bad faith or harassment) for which

the state offers statutory appellate review through its courts or otherwise, are pending for Younger purposes from the time it is initiated, until it has completed the review process. The City of Henderson began the adjudicative process of enforcing its laws when it initiated the quasi-judicial administrative proceeding before the City Council, which resulted in a determination by the City Council that Fantasy Video Plus' business license should be revoked because of fraudulent misrepresentations made in their business license application. The City Council stayed the enforcement of that revocation, in order to allow Fantasy Video Plus to pursue its right to state judicial review of the City of Henderson's revocation of said business license. The availability of state judicial review created an adjudicative continuum which existed at the time

Fantasy Video Plus filed its federal complaint. Alleghany Corp. v. Haase, 708 F.Supp. 1507 (W.D.Wis. 1989) at 1515-1519. The same Younger concerns that apply to ongoing administrative proceedings apply to ended administrative proceedings, where state court review is available. Alleghany Corp. v. Haase, supra, at 1515. See also Sun Refining & Marketing Co. v. Brennan, 921 F.2d 635 (6th Cir. 1990) at 639-640, citing World Famous Drinking Emporium, 820 F.2d 1079 (9th Cir. 1987) [Court found federal plaintiff clearly had unexhausted state appellate remedies where it had opportunity to appeal decision of Board of Building Appeals through state judicial system, holding "there was therefore an on-going state proceeding in this case" at the time the federal complaint was filed and that the Younger doctrine was applicable].

In this case, Fantasy Video Plus

lost its business license because of intentional fraudulent misrepresentations made in its application form. It is contrary to established public policy to preclude state enforcement action of Home Rule Powers against applicants who deliberately make false statements to the government in a business application in order to obtain a license. A federal litigant who has exhibited such "bad faith" is not entitled to a federal forum.

The preliminary injunction is a clear example of an unauthorized collateral federal appeal which substantially disrupts and interferes with the state appellate procedures which are en train.[4/]

4/ The same jurisdictional issue was before the United States Supreme Court in Huffman, supra. There the Lucas County Common Pleas Court had entered a

(Footnote Continued)

Additionally, because the declaratory judgment action was filed in state court before proceedings of substance on the merits took place in the federal court, the federal complaint should have been dismissed on the State's motion absent satisfactory proof of those extraordinary circumstances calling into play one of the limited exceptions to the rule of Younger v. Harris, 401 U.S. 31 (1971), and related cases. Hicks v. Miranda, 422 U.S. 332, 349-350 (1975).

(Footnote Continued)
final injunction of "closure" on a hard-core pornographic theater, after holding that the autoptical evidence (film and time and motion studies) established that a public nuisance existed at that theater under the Ohio Red Light Abatement Statute. The entry of that final injunction started the running of the statutory time for filing an appeal to the Court of Appeal and Ohio Supreme Court. Because the federal trial court wrongfully assumed jurisdiction and granted injunctive relief the important adjudication of "closure" was prevented from being adjudicated in the Ohio Judicial System.

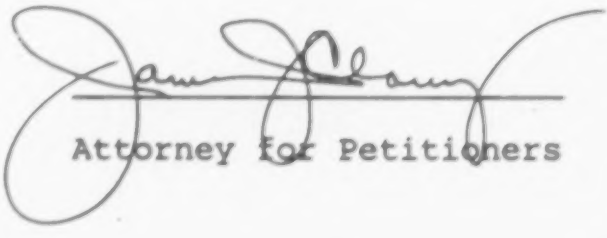
IV
CONCLUSION

Wherefore, Petitioners request this Court to:

(1) Grant a writ of certiorari pursuant to Rule 13 and require the United States District Court to vacate and annul its March 22, 1991 Order and to grant Petitioners' Motion to Dismiss the federal complaint on the ground of lack of federal jurisdiction.

(2) Pending action on this Petition, issue an Order requiring the United States District Court to stay the trial and the proceedings in the Court below which are presently set for Monday June 3, 1991.

Dated: May 16, 1991



Attorney for Petitioners

CERTIFICATE OF SERVICE

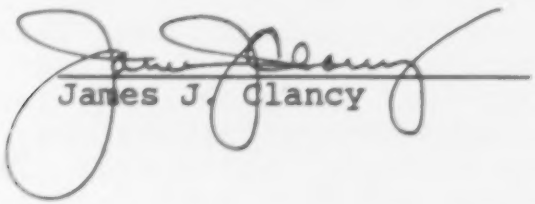
I hereby certify that on this 16th day of May, 1991, three copies of the within Petition for a Writ of Certiorari were deposited in the United States Post Office in Van Nuys, California with first-class postage prepaid, and properly addressed to the below listed parties to the proceedings and that all parties required to be served have been served:

The Honorable Lloyd D. George
United States District Court
District of Nevada
316 Federal Bldg. & U.S. Courthouse
300 Las Vegas Blvd. South
Las Vegas, NV. 89101

Solicitor General,
Department of Justice
Washington D.C. 20530

Carmine J. Colucci
629 South Sixth Street
Las Vegas, NV 89101
Attorney for Real Parties in Interest

Dated: May 16, 1991



James J. Clancy

APPENDIX 1

CITY OF HENDERSON SUMMONS AND COMPLAINT, DATED FEBRUARY 7, 1990, SETTING HEARING BEFORE THE CITY COUNCIL ON FANTASY VIDEO PLUS' LICENSE REVOCATION HEARING, AND ANSWER OF FANTASY VIDEO PLUS THERETO.

Reference: Petition for Writ of Certiorari at pages 12 and 22.

BEFORE THE CITY COUNCIL OF THE

CITY OF HENDERSON

COUNTY OF CLARK, STATE OF NEVADA

In the Matter of Disciplinary Action Against The Business License of Nevada Entertainment Industries, Inc., Daniel Bishop and Francisco S. Villalpando d/b/a Fantasy Video Plus.	SUMMONS

THE CITY COUNCIL OF THE CITY OF HENDERSON SENDS GREETINGS TO:

NEVADA ENTERTAINMENT INDUSTRIES, INC., DANIEL BISHOP and FRANCISCO S. VILLALPANDO d/b/a FANTASY VIDEO PLUS 1100 North Boulder Highway Henderson, Nevada 89015

YOU ARE HEREBY DIRECTED TO APPEAR, by serving upon the City Attorney, and by filing with the City Clerk of the City of Henderson City Council, your verified Answer to the Complaint attached hereto, stating whether or not you request a hearing, and admitting or

denying the facts alleged in the Complaint and by raising all legal and factual issues and defenses you desire the Council to consider, within ten (10) days after service hereof. Failure to file an Answer as required shall result in disciplinary action against you by default.

DATED this 7th day of February, 1990.

CITY OF HENDERSON CITY COUNCIL,
CLARK COUNTY, NEVADA

By_____
MAYOR

BEFORE THE CITY COUNCIL OF THE

CITY OF HENDERSON

COUNTY OF CLARK, STATE OF NEVADA

In the Matter of the Disciplinary Action Against the Business License of Nevada Entertainment Industries, Inc., Daniel Bishop and Francisco S. Villalpando d/b/a Fantasy Video Plus.	)	COMPLAINT

Comes now, the City of Henderson, by and through its attorney Shauna M. Hughes, Esq., City Attorney, and Liza Conroy, Esq., Assistant City Attorney, and as and for its causes of action alleges:

1. NEVADA ENTERTAINMENT INDUSTRIES, INC., DANIEL BISHOP and FRANCISCO S. VILLALPANDO, Licensees, d/b/a FANTASY VIDEO PLUS were issued a Gross Revenue Business License on the 21st day of September, 1989 for the location of 1100 North Boulder Highway, Henderson, Clark County, Nevada.

2. That on or about late July or early August 1989, an agent of licensees submitted an application for a retail video business which required the signature of an owner or corporate officer. An application was later returned, signed, with a description of the business. Said application is attached as Exhibit 1 hereto and incorporated by reference herein.

3. That pursuant to H.M.C. 4.04.020(d), the requirements of all departments and divisions must be met and approvals obtained.

4. That on or about August 31, 1989, an official of the Community and Planning Department went to the premises at 1100 N. Boulder Highway to inspect the premises known as Fantasy Video Plus to verify compliance with department requirements. The inspection official advised that proper zoning and a Use Permit were required for an "Adult

Business" pursuant to H.M.C. 19.24.004, Schedule C, Land Use Regulations.

5. That attached hereto as Exhibit 2 is the notice of requirements and corrections for business licensing issued to the licensees' agent advising of the zoning requirement.

6. That on or about September 1, 1989, licensees, or an agent of licensees, advised the Community and Planning Departments' inspection official that the business, Fantasy Video Plus, was not an "Adult Business" but a general video business with a minor area of the establishment to be devoted to adult entertainment.

7. That based upon the representations of licensees, or licensees' agent, said Community and Planning Department's inspection official approved the requirements and correction notice and forwarded same to the Business License Division.

8. That based upon licensees' business license application and receipt of approvals from all required inspections, the Business License Division issued a business license to Fantasy Video Plus.

9. That on or about February 1, 1990, an official from the Business License Division went to the premises and viewed the interior of the business finding that the nature of the business was predominately an adult, or sexually oriented, video, book, magazine and novelty store in contradiction to the description given in licensees' application and to the Community and Planning Department's inspection official.

WHEREFORE, the Business license of NEVADA ENTERTAINMENT INDUSTRIES, INC., DANIEL BISHOP and FRANCISCO S. VILLALPANDO d/b/a FANTASY VIDEO PLUS should be REVOKED for the following

grounds:

(a) Applicants must meet the requirements of all Departments or Divisions of the City and obtain approvals, H.M.C. 4.04.020(d).

(b) All business licenses issued are subject to suspension, limitation or revocation for failure of licensee, while engaged in the conduct of business, to comply with any provisions of the Henderson Municipal Code, H.M.C. 4.04.150(c).

(c) False or fraudulent statements in the application for the license constitutes good cause for revocation of the license, H.M.C. 4.04.150(a) (1), (3) (4); H.M.C. 4.04.150(b)(2),(3)(5).

DATED this 7th day of February, 1990.

DAVID G. LEE

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

DAVID G. LEE, being first duly sworn according to law, deposes and says:

That he is the Administrator of Licensing of the City of Henderson Business License Division; that he has read the foregoing Complaint, knows the contents thereof, and that the same is true based upon information received by him in his official capacity.

DAVID G. LEE

SUBSCRIBED and SWORN to
before me this 7th day
of February, 1990.

NOTARY PUBLIC in and for said
County and State.

SHAUNA M. HUGHES
CITY ATTORNEY
240 Water Street
Henderson, Nevada 89015

BEFORE THE CITY COUNCIL OF THE

CITY OF HENDERSON,

COUNTY OF CLARK, STATE OF NEVADA

In the Matter of the Disciplinary Action Against the Business License Of Nevada Entertainment Industries, Inc., Daniel Bishop and Francisco S. Villalpando d/b/a Fantasy Video Plus.	))))))))	ANSWER TO COMPLAINT

Comes Now Nevada Entertainment Industries, Inc., Daniel Bishop and Francisco S. Villalpando d/b/a Fantasy Video Plus, and respond to the Complaint as follows:

1. Admit that Nevada Entertainment Industries, Inc., d/b/a Fantasy Video Plus, licensee, was issued a gross revenue business license on the 21st day of September 1989 for the location of 1100 North Boulder Highway, Henderson, Clark County, Nevada. Deny that Daniel Bishop and Francisco S. Villalpando received any licenses.

2. Admit that on or about late July or early August 1989 an agent of Nevada Entertainment Industries, Inc. submitted an application for retail video business which required the signature of an owner or corporate officer. Admit that an application was later returned, signed by Daniel Bishop, with a description of the business. Admit that Exhibit 1 to the Complaint is a copy of the application which was submitted by Bishop.

3. Admit that Henderson Municipal Code Section 4.04.020(d) states what it purports to state. Deny the remaining allegations of paragraph 3.

4. Admit that on August 31, 1989, an official of the Community and Planning Department of the City of Henderson went to the premises at 1100 North Boulder Highway to inspect the premises known as Fantasy Video Plus to verify compliance with department requirements. Admit

that the inspection official advised that proper zoning and a use permit were required for "adult business" pursuant to Henderson Municipal Code Section 19.24.004, Schedule C, Land Use Regulations.

5. Admit that attached to Complaint as Exhibit 2 is a document known as "Requirements and Corrections for Business Licensing."

6. Admit that on or About September 1, 1989, Daniel Bishop advised the Community and Planning Departments' inspection official that the business, Fantasy Video Plus, was not an "adult business" but rather a general video business. Deny each and every remaining allegation of Paragraph 6.

7. Admit that the Community and Planning Departments' inspection official approved the Requirements and Correction notice and forwarded same to the Business License Division. Deny

each and every remaining allegation of Paragraph 7.

8. Admit that the Business License Division issued a business license to Fantasy Video Plus. Deny, for lack of information or belief, the remaining allegations of Paragraph 8.

9. Admit that on or about February 1, 1990 an official from the Business License Division went to the premises and viewed the interior of the business. Deny the remaining allegations of Paragraph 9.

FIRST AFFIRMATIVE DEFENSE

Fantasy Video Plus at 1100 North Boulder Highway is not an adult business within the meaning of the Henderson Municipal Code.

SECOND AFFIRMATIVE DEFENSE

The regulatory scheme of the Municipal Code of the City of Henderson is unconstitutional in violation of the First and Fourteenth Amendments to the

United States Constitution. The ordinance is too vague and does not provide a procedure for the prompt issuance of the necessary permits and licenses. For example, Henderson Municipal Code Section 19.24.004, Schedule C authorizes an adult business in the CH zone but imposes additional use regulations. In particular, an adult business is allowed in the CH zone, wherein the property is located, with a provision that a use permit be obtained and also with a provision that it be subject to local requirements set forth in the licensing regulations of the Henderson Municipal Code. In order to obtain a use permit, Section 19.74.012(A) requires that the City Council and Commission find, among other things, that the proposed location of the use and the proposed conditions under which it would be operated ... will not be detrimental to the public

health, safety or welfare of persons residing or working in or adjacent to the neighborhood of such use; and will not be detrimental to properties or improvements in the vicinity or to the general welfare of the City . . . ." These standards are too vague to withstand constitutional scrutiny. See e.g., FW/PBS v. Dallas, ___ U.S. ___ (January 9, 1990).

THIRD AFFIRMATIVE DEFENSE

The alleged misrepresentation was not material; had the disclosure been made that the City now asserts should have been made, the necessary license would nevertheless have issued.

WHEREFORE, Fantasy Video Plus prays that the Complaint be dismissed and that its license not be suspended or revoked.

To the extent the City wishes to conduct hearings and require permits and licenses, Nevada Entertainment Industries, Inc. prays that the

appropriate City departments, Commissions, and officers conduct the necessary hearings and then grant the required permits and licenses.

A hearing is hereby requested.

Dated this ____ day of February, 1990.

NEVADA ENTERTAINMENT
INDUSTRIES, INC.

By: _____
DANIEL BISHOP

_____
DANIEL BISHOP

_____
FRANCISCO S. VILLALPANDO

MY COMMISSION EXPIRES JAN 30, 1994
STATE OF WISCONSIN COUNTY OF
KENOSHA

DANIEL BISHOP CAME BEFORE ME ON
FEB. 16, 1990

_____
BARBARA A. ROSS

APPENDIX 2

CITY COUNCIL DECISION AND ORDER, DATED APRIL 16, 1990, REVOKING THE BUSINESS LICENSE OF NEVADA ENTERTAINMENT INDUSTRIES, INC. d.b.a. FANTASY VIDEO PLUS AND STAYING ENFORCEMENT FOR TEN (10) BUSINESS DAYS TO ALLOW AN APPEAL TO THE NEVADA DISTRICT COURT.

Reference: Petition for Writ of Certiorari at page 12.

BEFORE THE CITY COUNCIL OF THE CITY OF HENDERSON

COUNTY OF CLARK, STATE OF NEVADA

* * *

In the Matter of the Disciplinary Action Against the Business License of NEVADA ENTERTAINMENT INDUSTRIES, INC., DANIEL BISHOP and FRANCISCO S. VILLALPANDO d/b/a FANTASY VIDEO PLUS	DECISION AND ORDER

The CITY COUNCIL of the CITY OF HENDERSON, having heard and considered all the evidence presented at the business license revocation hearing in the above-entitled matter on April 10, 1990, makes the following findings of fact and determination of issues, and renders its final decision as follows:

1.) The evidence shows the licensees originally advised the CITY the videos were "adult";

2.) When licensees were told they needed a zone change and use permit to

operate as an adult video business, the licensees changed their application to reflect "mass media video/book and novelty" with the full intention to proceed as an adult video, book and novelty store;

3.) The licensees changed their application with the full intention to misrepresent and mislead the Business License Department in order to open for business without obtaining a zone change and use permit;

4.) The use of the term "mass media" was done to deliberately mislead and deceive the City staff in order to cause a business license to be issued;

5.) The licensee answered in the negative questions regarding previous convictions on the business license application which affects his credibility and is itself a misrepresentation;

6.) The evidence showed the

business consisted of predominantly, 75-80%, adult materials;

7.) The omission by licensees of the nature of the business was done deliberately to mislead and deceive City staff in order to have a business license issued without applying for a zone change and use permit;

8.) The licensees offered no evidence to refute any of the evidence offered by the CITY regarding arrests or misrepresentation of the nature of the store's business;

9.) The licensee tried to divert attention from the limited issue at hand which is the misrepresentation of the nature of the business to the Business License Department;

10.) Each of the witnesses who testified were credible and their testimony truthful;

Based on the foregoing findings and conclusions, the CITY COUNCIL hereby

revokes the business license of NEVADA ENTERTAINMENT INDUSTRIES, INC., d/b/a FANTASY VIDEO PLUS, orders written notice of its decision to licensees within five (5) business days, and stays the enforcement of the revocation for ten (10) business days following receipt of the written notice of revocation.

DATED this 16th day of April, 1990.

CITY COUNCIL OF THE CITY OF HENDERSON

_____
LORNA KESTERSON, Mayor

_____
ANDY HAYEN

_____
CARLTON LAWRENCE

ATTEST:

_____
DOROTHY VONDENBRINK,
CMC, City Clerk

_____
MICHAEL HARRIS

_____
LORIN WILLIAMS

APPENDIX 3

UNITED STATES DISTRICT COURT'S TEMPORARY RESTRAINING ORDER ENTERED ON APRIL 27, 1990 RESTRAINING ENFORCEMENT OF THE CITY COUNCIL ORDER DATED APRIL 16, 1990 AND THE CITY'S LICENSING AND ZONING ORDINANCES AS THEY APPLY TO FANTASY VIDEO PLUS.

Reference: Petition for Writ of Certiorari at pages 12 and 23.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, et al.,	)	CV-S-90-264-LDG
Plaintiffs,	)	[ENTERED APRIL 27, 1990 Clerk, U.S. Dist. Court, Dist. of Nevada By ____Deputy]
v.	)	
CITY OF HENDERSON, et al.,	)	
Defendants.	)	

ORDER

This matter is before the court on plaintiffs' motion for a temporary restraining order (#2) pursuant to Rule 65 of the Federal Rules of Civil Procedure. Plaintiffs currently operate an adult bookstore within the City of Henderson. Based upon alleged discrepancies in plaintiffs' license application, the City has revoked plaintiffs' license as of May 1, 1990. Plaintiffs challenge the constitutionality of defendants'

licensing and zoning schemes as applied to their adult entertainment business. Plaintiffs assert that these schemes violate their First and Fourteenth Amendment Rights.

Both plaintiffs' and defendants' counsel presented oral arguments on April 27, 1990. Upon review of the record and consideration or oral arguments, the court finds that a temporary restraining order is warranted. Plaintiffs will suffer substantial hardship and possible irreparable harm if their business is closed and if they are unable to exercise their First Amendment rights. See Ebel v. City of Corona, 698 F.2d 390, 393 (9th Cir. 1976). Furthermore, plaintiffs raise substantial questions regarding the validity of the City's ordinances. Thus,

IT IS HEREBY ORDERED, that plaintiffs application for a temporary

restraining order (#2) is granted.

IT IS FURTHER ORDERED, defendants,and each of them, their officers, agents, servants, employees, and attorneys, and all other persons or entities in active concert or participation with them or under their direction, supervision and control, are restrained and enjoined, pending the termination of this order, from:

(a) Closing down plaintiffs' business at 1100 Boulder Highway, Henderson, NV., or arresting, and/or citing or prosecuting, plaintiffs or any of their employees for allegedly violating the provisions of the Henderson Municipal Code regarding business licenses, zoning or conditional use permits;

(b) Revoking plaintiffs' business license issued on September 21, 1989;

(c) Enforcing Ordinance No. 1160;

(d) Enforcing the ordinances of the City of Henderson regarding business licenses, conditional use permits, or zoning, as they apply to plaintiffs' bookstore and arcade at 100 Boulder Highway, Henderson, NV.

IT IS FURTHER ORDERED, that plaintiffs post a $10,000 bond pursuant to Rule 65(c) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED, that the preliminary injunction hearing set for May 4, 1990 is vacated, and the hearing is rescheduled for June 1, 1990 at 1:30 p.m. in courtroom number 3.

IT IS FURTHER ORDERED, that defendants' opposition to plaintiffs' motion for preliminary injunction shall be filed by 4:00 p.m. on May 14, 1990, and if plaintiffs wish to file a reply brief, they shall file it by 4:00 p.m.

on May 25, 1990.

DATE: 27 April 1990

LLOYD D. GEORGE
United State District
Judge

APPENDIX 4

UNITED STATES DISTRICT COURT'S PRELIMINARY INJUNCTION ENTERED ON JUNE 4, 1990, ENJOINING ENFORCEMENT OF THE CITY COUNCIL ORDER DATED APRIL 16, 1990 AND THE CITY'S LICENSING AND ZONING ORDINANCES AS THEY APPLY TO FANTASY VIDEO PLUS.

Reference: Petition for Writ of Certiorari at pages 11, 13 and 23.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES INC., et al.,	)	CV-S-90-264-LDG
Plaintiffs,	)	[ENTERED JUNE 4, 1990 Clerk, U.S. Dist. Court, Dist. of Nevada By_____Deputy]
v.	)	
CITY OF HENDERSON, et al.,	)	
Defendants.	)	

ORDER

This matter is before the court on plaintiffs' motion for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. Plaintiffs operate an adult theater and bookstore located in the City of Henderson. The City requires that such businesses locate within a "CH" zone. Furthermore, in order to operate the business, the City requires that plaintiffs obtain a business license and a use permit. Plaintiffs applied for

and received a business license based upon the following description: "Mass media books and video store, novelty shop, etc." Upon the opening of the business in February 1990, the City moved to revoke the license since it misrepresented the nature of plaintiffs' business. Plaintiffs contends that the license is not fraudulent. More importantly, plaintiffs contend that the license and use permit ordinances are facially invalid since they vest too much discretion in the hands of city officials in violation of plaintiffs' First and Fourteenth Amendment rights. Although the City Council voted to revoke the license, this court granted a temporary restraining order on April 27, 1990. On June 1, 1990, this court heard oral arguments on the motion for a preliminary injunction.

The standard for granting a preliminary injunction is clear. A

plaintiff must show probable success on the merits and irreparable injury. Ebel v. City of Corona, 698 F.2d 390, 392 (9th Cir. 1983). In the alternative, a plaintiff must show the existence of serious questions regarding the merits and that the balance of hardships tips sharply in his favor. Id.

As for the harm element, the court recognizes that the City suffers a certain amount of harm whenever a court prevents the enforcement of a regulatory scheme. However, plaintiffs have invested time and money into their business, and they have operated their business for some four months. Plaintiffs would suffer economic loss if the court forces them to close their business pending the resolution of this matter. Although plaintiffs do not have a use permit, plaintiffs have not violated any other ordinance, and the business sits within a CH zone.

Furthermore, the court noted in Ebel that "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' Eldrod v. Burns, 427 U.S. 347 . . . (1976)." 698 F.2d at 393. Thus, plaintiffs must prevail on both the irreparable injury and the balance of hardships prong of the test.

Both parties agree that the City has the power to enact business license and zoning requirements. The court recognizes that City has valid regulatory interests. The Supreme Court has upheld zoning requirements which purport to limit the locations available for adult theaters and stores. See City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976). However, the City's ordinances appear to go beyond neutral time, place and manner regulations which allow alternative

means of communication. The ordinances allow officials to deny applications for licenses and permits based upon factors such as the general welfare or, in the case of a license, for any just or equitable reason. As the Supreme Court noted in Staub v. City of Baxley, 355 U.S. 313, 322 (1958),

> It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of any official-as by requiring a permit or license which may be granted or withheld in the discretion of such official-is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

The Supreme Court recently quoted this language with approval in FW/PBS, Inc. v. City of Dallas, 110 S.Ct. 596 (1990). Such discretionary power may result in impermissible censorship and arbitrary suppression. A review of the ordinances suggests that officials have unbridled discretion in granting licenses and

issuing permits. At this time, the court has no authoritative indication of how an official's discretion may be limited. Thus, the court believes that plaintiffs have raised serious questions regarding the validity of the ordinances as applied to their business. This factor coupled with the fact that the balance of hardships favors plaintiffs calls for the issuance of the preliminary injunction. Consequently,

IT IS HEREBY ORDERED, that plaintiffs' motion for a preliminary injunction is granted.

IT IS FURTHER ORDERED, defendants, and each of them, their officers, agents, servants, employees, and attorneys, and all other persons or entities in active concert or participation with them or under their directions, supervision and control, are restrained and enjoined, pending the termination of this order, from:

(a) Closing down plaintiffs' business at 1100 Boulder Highway, Henderson, NV., or arresting, and/or citing or prosecuting, plaintiffs or any of their employees for allegedly violating the provisions of the Henderson Municipal Code regarding business licenses, zoning or conditional use permits;

(b) Revoking plaintiffs' business license issued on September 21, 1989;

(c) Enforcing Ordinance No. 1160 against plaintiffs;

(d) Enforcing the ordinances of the City of Henderson regarding business licenses, conditional use permits, or zoning, as they apply to plaintiffs' bookstore and arcade at 100 Boulder Highway, Henderson, NV.

IT IS FURTHER ORDERED, that

plaintiffs maintain a $20,000 bond pursuant to Rule 65(c) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED, that defendants supply the court with the full text of all applicable Henderson ordinances prior to the trial on this matter.

DATE: 4 June 1990

LLOYD D. GEORGE
United States District Judge

APPENDIX 5

UNITED STATES DISTRICT COURT'S ORDER AND OPINION ENTERED MARCH 22, 1991, DENYING THE CITY'S MOTION TO DISMISS THE CIVIL RIGHTS LAWSUIT ON THE GROUNDS OF LACK OF FEDERAL JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE BASED AND REFUSING TO ISSUE AN ORDER TO SHOW CAUSE WHY THE FEDERAL PLAINTIFFS SHOULD NOT BE REQUIRED TO PRESENT THEIR FEDERAL CLAIMS IN THE STATE DECLARATORY JUDGMENT LAWSUIT.

Reference: Petition for Writ of Certiorari at pages 13 and 27.

UNITED STATE DISTRICT COURT
DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al.,	)	CV-S-90-264-LDG (LRL)
Plaintiffs,	)	[ENTERED MAR. 22, 1991 Clerk, U.S. Dist. Court, Dist. of Nevada By___Deputy]
v.	)	
CITY OF HENDERSON, et al.,	)	
Defendants.	)	

ORDER

Plaintiffs have filed this action pursuant to 42 U.S.C. Section 1983 and allege a deprivation of their constitutional rights. Plaintiffs operate an adult theater and bookstore located in the City of Henderson. The City requires that such businesses locate within a "CH" zone. Furthermore, in order to operate the business, the City requires that plaintiffs obtain a business license and a use permit.

Plaintiffs applied for and received a business license based upon the following description: "Mass media books and video store, novelty shop, etc." Upon the opening of the business in February 1990, the City moved to revoke the license since it misrepresented the nature of plaintiffs' business. Plaintiffs contend that the application was not fraudulent. More importantly, plaintiffs contend that the license and use permit ordinances are invalid since they vest too much discretion in the hands of city officials in violation of plaintiffs' First and Fourteenth Amendment rights. Although the City Council voted to revoke the license, this court granted a temporary restraining order on April 27, 1990. After hearing oral arguments, this court granted a preliminary injunction on June 5, 1990. On October 1, 1990, the City filed a complaint for

declaratory judgment and injunctive relief in a Nevada state court. This matter is currently before the court on defendants' motion to dismiss (#24).

The City believes that the parties should adjudicate this dispute in state rather than federal court. However, this court is mindful of the principle that "abstention from the exercise of federal jurisdiction is the exception, not the rule." Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976). Courts are especially reluctant to abstain when First Amendment issues are involved. Baggett v. Bullitt, 377 U.S. 350, 379 (1964); Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 532 (9th Cir. 1984), rev'd on other grounds, 475 U.S. 14 (1986). In general, abstention is inappropriate when extensive rather than a single adjudication would be required by a state court. Harris County

Commissioners Court v. Moore, 420 U.S. 77, 86 n.9 (1975) (citing Baggett, 377 U.S. at 378). The various licensing and regulatory ordinances involved in this litigation do not readily lend themselves to a single state court adjudication. The obligations imposed by the ordinances rather than the applicability of the ordinances are at issue.

The City seeks abstention based upon the principles contained in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). Huffman followed the abstention principles formulated in Younger v. Harris, 401 U.S. 37 (1971) which generally preclude a federal court from intervening in a pending state criminal prosecution. Id. at 41. Huffman required the Court to consider whether Younger "bars a federal court from intervening in a state civil proceeding such as this, when the proceeding is

based on a state statute believed by the district court to be unconstitutional." Huffman, 420 U.S. at 594. In Huffman, the owner of an adult theater challenged attempts by Ohio authorities to invoke the state public nuisance statute. A state court determined that the owner had displayed obscene movies and should be closed pursuant to the statute. Rather than file a direct appeal, the owner filed a federal action pursuant to 42 U.S.C. Section 1983 alleging that the use of the statute constituted a deprivation of constitutional rights under color of state law. Id. at 598. The Supreme Court held that Younger did bar federal action. The Court found that "[t]he state is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statues which prohibit the dissemination of obscene materials." Id. at 604.

However, the court stated that "we need make no general pronouncements upon the applicability of Younger to all civil litigation." Id. at 607. Although subsequent cases have applied Younger to other civil litigation, the Court has never adopted a rule that Younger applies to all civil litigation. See, e.g., Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982); Moore v. Sims, 442 U.S. 415 (1979); Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977).

Upon a review of the record, it is clear that the principles of Younger and Huffman should not apply to this litigation. Huffman can be distinguished in several important respects. Unlike Huffman, this litigation involves more than simply an application of state nuisance laws. In Huffman, a court had already determined

that the theater was showing obscene materials, but no such determination has been made in this case. Although obscenity is outside the scope of the First Amendment, some adult materials are afforded First Amendment protection. See Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1199 (9th Cir.), cert. denied, 110 S.Ct. 59 (1989). Perhaps most importantly, the federal complaint in Huffman was filed in the midst of on-going state litigation.

Before invoking the principles of Younger and Huffman, a state action must exist. As the Supreme Court stated,

> [w]hen no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.

Huffman, 420 U.S. at 885 (quoting

Steffel Thompson, 415 U.S. 452, 462 (1974). This requirement is not met simply by filing a federal action first. As the Supreme Court noted in Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 238 (1984), "Younger abstention is required, however, only when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place.' Hicks v. Miranda, [422 U.S. 332, 349 (1975)]. In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them." See also Adultworld Bookstore v. City of Fresno, 758 F.2d 1348, 1350-51 (9th Cir. 1985). Thus, we must examine whether "proceedings of substance on the merits" took place in this court prior to the filing of the state action. In Hawaii Housing Authority, the Court stated that "[a] federal court action in which a preliminary injunction is granted has

proceeded well beyond the 'embryonic stage,' [Doran v. Salem Inn, Inc., 422 U.S. 922, 929 (1975)], and considerations of economy, equity, and federalism counsel against Younger abstention at that point." 467 U.S. at 238. In the present case, this court issued the preliminary injunction some four months prior to the filing of the state court action. Thus, based on the above analysis, the court finds that abstention is not proper.

Additionally, a plaintiff need not exhaust available state remedies prior to bringing a federal action pursuant to Section 1983. The Supreme Court has recognized that "[w]hen federal claims are premised on 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3) . . . we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to

protect constitutional rights." Steffel v. Thompson, 415 U.S. 452, 472-73 (1974). The Supreme Court established a limited exception in Parratt v. Taylor, 451 U.S. 527 (1981). In Parratt, an inmate alleged that a state official's negligence deprived him of property without due process. The Court required the claimant to exhaust his state remedies which would fully compensate him for his monetary loss. Id. at 544. However, requiring state court exhaustion of all Section 1983 claims would be contrary to Congressional intent. See Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 508 (1982). Finally, the court does not believe that the Henderson Municipal Code compels a party to take their dispute to state court. Section 4.06.160 provides that "[a]ny person aggrieved by final decision or order of the City Council . . . may obtain a

judicial review . . . in the Eight Judicial District Court." This section is written with permissive rather than mandatory language. Thus,

IT IS HEREBY ORDERED, that defendants' motion to dismiss (#25) is denied.

IT IS FURTHER ORDERED, that defendants' application to show cause (#24) is denied.

DATE: 20, March 1990

LLOYD D. GEORGE
United States District
Judge

APPENDIX 6

UNITED STATES DISTRICT COURT'S ORDER DATED APRIL 9, 1991, WHICH DENIED THE CITY'S MOTION TO CERTIFY AN INTERLOCUTORY APPEAL OF THE REFUSAL TO DISMISS THE CIVIL RIGHTS LAWSUIT.

Reference: Petition for Writ of Certiorari at pages 10, 14 and 30.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES INC., et al.,	)	CV-S-90-264-LDG (LRL)
Plaintiffs,	)	[ENTERED APRIL 9, 1991 Clerk, U.S. Dist. Court, Dist. of Nevada By ____Deputy]
v.	)	
CITY OF HENDERSON, et al.,	)	
Defendants.	)	

ORDER

On March 22, 1991, this court entered an order denying defendant City of Henderson's motion to dismiss. Henderson had contended that this court should allow a Nevada state court to review this matter. Upon denial of the motion, Henderson has filed this motion to amend interlocutory order and stay proceedings (#31). Henderson basically asks the court to certify its order for an interlocutory appeal. Pursuant to 28

U.S.C. Section 1292, a district court may certify such an appeal if the order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal might materially advance the ultimate termination of the litigation. Based upon a review of the record, the court does not believe that an interlocutory appeal is warranted. In particular, the court fails to find a substantial ground for difference of opinion. This court's rationale is adequately stated in its March 22 order. Additionally, this matter can be quickly resolved after a brief trial. As noted at the March 29, 1991 conference, the court believes the better course is to proceed to trial immediately, and then allow for appropriate appellate review of all questions. Depending upon the outcome at trial, Henderson may no longer desire any review. Thus,

IT IS HEREBY ORDERED, that Henderson's motion to certify an interlocutory appeal (#31) is denied.

DATE; 9 APRIL, 1991

/s/
LLOYD D. GEORGE
U.S. District Judge

APPENDIX 7

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ORDER FILED MAY 2, 1991 DENYING CITY'S PETITION FOR WRIT OF MANDAMUS AND APPLICATION FOR A STAY OF DISTRICT COURT PROCEEDINGS.

Reference: Petition for Writ of Certiorari at pages 2, 12 and 14.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF HENDERSON, NEVADA, et al.,	No. 91-70233
Petitioners,	DC# CV-S-90-264-LDG-L Nevada (Las Vegas)
vs.	
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA,	ORDER
Respondent,	FILED May 2, 1991 CLERK, U.S. COURT OF APPEALS
and	
NEVADA ENTERTAINMENT INDUSTRIES, INC., et al., Real Parties in Interest.	

Before: NORRIS, BEEZER and O'SCANNLAIN, Circuit Judges

The petition for writ of mandamus is denied. Petitioners' request for a stay of district court proceedings pending disposition of the petition is denied as moot.